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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/845,417	04/30/2001	Michael P. Hynes	00414-062001	2882

7590 07/18/2002

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EXAMINER
PRATT, HELEN F

ART UNIT	PAPER NUMBER
1761	6

DATE MAILED: 07/18/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

MF 4

Office Action Summary	Application No.	Applicant(s)	
	09/845,417	HYNES ET AL.	
	Examiner	Art Unit	
	Helen F. Pratt	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *01 April 2001 and 22 August 2001* .

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-26* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-26* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11)☐ The proposed drawing correction filed on _____ is: a)☐ approved b)☐ disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12)☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

13)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____ .

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

14)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) ☐ The translation of the foreign language provisional application has been received.

15)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ .
4) ☐ Interview Summary (PTO-413) Paper No(s). _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: .

DETAILED ACTION

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1-26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mehansho et al. (4,992,282) in view of Clark (5,376,396), and Calderas (5,431,940) and Pflaumer et al. (5,641,532).

Mehansho et al. disclose a beverage containing sugar, pectin, water and flavors, juice concentrates, and vitamins (col. 10, lines 36-41 and col. 12, lines 34-45, col. 15, lines 25-40, col. 8, lines 65-70 and col. 9, lines 1-14, col. 4, lines 55-70). Claims 1-4 differ from the reference in the use of only fructose and sucrose as sweeteners and in the particular ratios of ingredients (col. 9, lines 5-35). Clark also discloses that pectin is a well known food stabilizer in beverages (col. 1, lines 16-20). Calderas discloses that it is known to use sucrose and fructose together in beverage compositions (col. 8, lines 50-59. Fructose is known to be sweeter than sucrose. Pflaumer et al. disclose that it is known to use pectin in a beverage with a flavor and stabilizer and preservatives (col. 2, lines 49-70, col. 6, lines 53-60 and sucrose and fructose (col. 9, lines 46-70). The particular ratios are seen as within the skill of the ordinary worker. The discovery of an optimum value of a result effective variable is ordinarily within the skill of the art. In re Boesch, 617 F.2d 272, 276, 205 USPQ 215, 219 (CCPA 1980). In developing a

beverage product, properties such as sweetness, stability and viscosity are important. It appears that the precise ingredients as well as their proportions affect the sweetness stability and viscosity of the product, and thus are result effective variables, which one of ordinary skill in the art would routinely optimize. Therefore, it would have been obvious to use a particular ratio of sweeteners and pectin, to make the claimed product.

Claims 5-9 further differ from the references in that the composition does not contain water. However, the composition does not exclude the addition of water. Also, dry mixes are well known, and nothing new is seen in the claimed composition without water. Therefore, it would have been obvious to make a composition without water. Claim 10 further requires the use of cranberry juice and proanthocyanidins. Mehansho et al. discloses the use of any flavor in the beverage (col. 9, lines 46-59). Official Notice is taken that cranberry beverages containing cranberry juice are well known. Proanthocyanidins are disclosed as being known in the specification as is cranberry juice in drinks (page 1, last paragraph) as are the other limitations of claim 10, except for the use of fructose and the particular ratio's and the amount of calories and the use of no artificial sweetening. However, as to the ratio, see the discussion above as to In re Boesch. Certainly, the particular amount of calories is determined by the amount of sweeteners, and nothing new is seen in using particularly sweet sweeteners in a product. (Mehansho et al. at col. 10, lines 36-70 and col. 11, lines 1-25). It is recognized that certain juices are sour and need more sweeteners. Also, for example, more sugar is put in coffee and tea, to make it sweeter. The use of artificial sweeteners or not is within the skill of the ordinary worker. Attention is invited to In re Levin, 84

USPQ 232 and the cases cited therein, which are considered in point in the fact situation of the instant case, and wherein the Court stated on page 234 as follows:

This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected, and useful function. In re Benjamin D. White, 17 C.C.P.A (Patents) 956, 39 F.2d 974, 5 USPQ 267; In re Mason et al., 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 USPQ 221. Therefore, it would have been obvious to use known ingredients and to vary the amounts to achieve a particular level of sweetness and viscosity.

Claims 11-26 are rejected under 35 U.S.C. 103(a) as being unpatentable over the above combined references as applied to claims 1-10 above, and further in view of Wallin et al., Stahl et al., Norris et al. and Yanko.

Claim 11 further requires UTH extract. Wallin et al. disclose that it is known to make an extract from cranberries (col. 7, lines 40-55), and Stahl et al. disclose a cranberry extract which contains cranberry juice, acids, sugars, etc. (col. 3, lines 32-43). Norris et al. disclose using extracts from foods to alter the flavor and taste of a beverage (abstract). Yanko discloses that it is known to flavor beverages with a cranberry flavor

from an extract (abstract). Therefore, it would have been obvious to use an UTH extract to flavor beverages.

The limitations of the further claims have been discussed above and are obvious for those reasons except for combining one or more flavor agents as in claim 18 and of combining juice concentrates as in claim 19 and enhancers as in claim 21 and the brix value as in claims 23-25. However, nothing new or unobvious is seen in combining these various ingredients or in the particular brix value which is within the skill of the ordinary worker to use whatever brix was desired.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 703-308-1978. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on (703) 308-3959. The fax phone number for the organization where this application or proceeding is assigned is 703-305-7718.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0651.

Hp 7-11-02

HELEN PRATT
PRIMARY EXAMINER